

ROGER NEWTON,)	
Claimant)	
VS.)	
)	
THE BOEING COMPANY,)	Docket No. 213,200
Respondent)	
AND)	
)	
KEMPER INSURANCE COMPANIES,)	
Insurance Carrier)	

Claimant appeals from the preliminary hearing Order of Administrative Law Judge John D. Clark dated December 3, 1996, wherein the Administrative Law Judge denied claimant benefits finding claimant's present physical problems were not the result of a new injury but rather a continuation of claimant's long-standing back problems.

Claimant appeals this matter alleging that the Administrative Law Judge erred in finding this to be an aggravation of a preexisting condition rather than an injury arising out of and in the course of his employment with the respondent.

At the preliminary hearing respondent raised the issue of notice for the four separate injuries alleged by claimant but this was not decided by the Administrative Law Judge who denied benefits based upon the respondent's defense of lack of compensability.

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board finds the preliminary hearing Order of Administrative Law Judge should be affirmed.

Claimant alleged injuries in September 1995, December 1995, March 1996, and on either April 2 or April 4, 1996, to his back, left leg, and left testicle.

Claimant had a long history of back problems stemming from an injury in 1989 from which he entered into a stipulated running award with the respondent. Claimant is receiving ongoing medical care from that injury. The above-specified additional injuries in 1995 and in 1996 were all, by claimant's admission, injuries which the respondent was not advised of until sometime in May 1996.

The injury of April 2 (as alleged in the preliminary hearing, page 15) or April 4 (as alleged in claimant's E-3 filed with the Division of Workers Compensation) occurred while claimant was carrying certain long, metal two-by-fours. Claimant testified to a sudden onset of pain with specific radiculopathy down into his left testicle and leg. Claimant acknowledged he did not advise the respondent's supervisor of this injury until approximately a week before his Boeing Central Medical examination on May 15, 1996. The medical records indicate that applicant was receiving medical care through James P. Keller, M.D., between April 2 and May 15, 1996, with no mention to Dr. Keller of any new work-related injury on or about April 2 or April 4, 1996.

It is significant that Dr. Robert L. Eyster's report of May 16, 1996, indicates that claimant injured himself at home. Claimant alleges this to be an error on Dr. Eyster's part but cannot explain the time discrepancy between the alleged April 2 or April 4 injury and the first conference with claimant's supervisor in May 1996.

The Appeals Board finds, based upon the evidence presented, that claimant has failed to prove by a preponderance of the credible evidence that he suffered additional injury arising out of and in the course of his employment with the respondent on the dates alleged. As such, the Order of the Administrative Law Judge dated December 3, 1996, should be, and is hereby affirmed.

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated December 3, 1996, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 1997.

BOARD MEMBER

c: Brian D. Pistotnik, Wichita, KS
Vaughn Burkholder, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director